

## CONCILIATIONS

### PRINCIPLES, TECHNIQUES AND PROCEDURES

#### INTRODUCTION:

Effective conciliation of civil rights cases depends upon the quality of the investigation, the creativeness with which the proposed relief is drafted, and the persuasive ability of the commission representative serving as conciliator. The experienced conciliator is prepared for a variety of reactions from the respondent. These range from a total willingness to cooperate and an agreement with the findings of the commission, through a degree of disagreement with the commission but a willingness to engage in good faith negotiations, to total refusal to bargain further.

It is only in the last of these circumstances that a case is ultimately slated for public hearing. The conciliator, being aware the Commission possesses this ultimate power to conduct a hearing and issue a court enforceable order, speak softly. It is pointed out diplomatically that the power exists, and the conciliator is certain that the respondent is aware of it. The conciliator understands that the respondent has the legal right to make use of this forum in instances where the respondent believes that the Commission has committed some form of error. The role of the conciliator is therefore somewhat limited: he/she is needed only in those instances where the respondent desires, or can be persuaded to engage in a discussion of remedy for the practices found unlawful by the commission in its decision.

#### CONSENT ORDERS AND CONCILIATION AGREEMENTS:

"Conciliation agreements" and consent orders, "the former is a generic term which refers to the document which the commission and the respondent



generally enter into to formalize the agreement and dispose of the complaint. The conciliation agreement may be a long and formalized memorandum signed and notarized by all sides, or it may be somewhat simpler, perhaps a letter from the respondent which the commission accepts as a satisfactory adjustment to the complaint. The term "consent order" refers to a form of conciliation agreement which the commission uses periodically. A consent order is a conciliation agreement which, by agreement of the parties, has the same force and effect of a Commission order following a public hearing. Should the terms of the order be violated, the commission seeks enforcement from the appropriate court in the same manner in which it would seek enforcement of an order which the respondent might have disobeyed where such an order had been issued following a public hearing. The Newark Human Rights Commission's conciliation agreement consist of the consent order.

#### ESSENTIAL ELEMENTS OF CONCILIATION AGREEMENTS:

While the subject matter of conciliation agreements will differ widely, certain principles control most agreements. These are elements which are considered essential to all agreement; agreements lacking such elements are generally unacceptable to the commission.

#### PROPER NAMES OF PARTIES:

In order to form a legally binding agreement, it is necessary to name the parties appropriately. Presumably this should be no problem if during the investigation the proper name and address of the respondent have been verified. The conciliator should be assured that this verification took place during the investigation.



STATEMENT OF COMPLIANCE:

A general statement that a respondent will conduct all operations on a non-discriminatory basis in compliance with state law is essential because it gives the Commission the authority to review further practices of the respondent and to find such violation as a violation of the agreement.

ITEMIZATION OF SPECIFICS:

For every discriminatory practice found as a violation of the statute in the decision it is essential to frame the appropriate relief. While the general statement of compliance (statement of principle) has a value, it is by no means a substitute for detailed explication of behavior which must be modified by the respondent. The more specific the requirements outlined in the conciliation agreement, the easier it is to monitor and police the performance of the respondent pursuant to the agreement.

REVIEW PROCEDURE:

It is advisable to include language by which either party may initiate a review of the compliance with the terms of the agreement. In the case of the Commission the best system is generally to provide that the Commission, where it finds that the respondent is not in compliance with the agreement, will issue a notice of non-compliance and give the respondent a brief period of time, usually not more than ten days, to take the specific steps required by the notice to come in compliance before the Commission initiates enforcement procedures. Most agreements have a self-execution completion, either a specific action with respect to an individual or individuals (such as hiring, reinstatement, back pay awards, etc.) or, in broader pattern cases, a certain time period such as two



years under which the respondent operates a new non-discriminatory employment system outlined by the agreement.

ENFORCEMENT PROCEDURES:

An agreement which is unenforceable is of little value if the respondent fails to live up to it. Some language to the effect that the "Respondent agrees to undertake the specific steps outlined herein and enters into this agreement with the intent to be legally bound thereby" tend to make a conciliation agreement, even those which are not consent orders into simple contracts. The language should permit the commission to go to court and enforce the contract if the respondent fails to live up to it.

REPORTING:

The only way to effectively review the performance of the respondent under the agreement, and to initiate enforcement proceedings if such action is necessary, is to have a reporting system by which the Commission can routinely be apprised of the progress of the respondent. Where the agreement only requires the respondent to undertake a specific action, such as hire or reinstatement or the issuance of a back pay award, obviously the reporting is relatively simple: the respondent needs simply send a certified copy of the check or personnel action to the commission so that the case can be closed as satisfactorily adjusted. In broader pattern cases, however, where a marked change in employment procedures has been instituted, it will be necessary to have reports at quarterly or six months intervals so that the commission can assure that (s) specifics provided for by the agreement are being followed, and (c) the procedures are achieving some



results. Obviously, where the procedures are being followed and no results are being obtained, there may be some reason to review the effectiveness of the agreement. On the other hand, where the procedures are not being followed but results are being obtained it may be advisable to consider changing the procedures are not being followed but results are being obtained it may be advisable to consider changing the procedures if they cannot be demonstrated to be responsible for the increased participation. Finally, there may be instances in which the respondent simply does not follow the procedures of the agreement, and it will be necessary, based on this information, to initiate the appropriate judicial procedures under the enforcement section of the agreement.

LIMITATION OF THE AGREEMENT TO THE INSTANT CASE:

Language should be included to make it clear that the successful resolution of the case to which the agreement addresses itself has no effect on the handling or disposition of other cases filed with the U. S. <sup>Equal</sup> Employment Opportunity Commission under the 1964 Civil Rights Act Title VII, or other complaints which may be filed with the New Jersey Division on Civil Rights. Language may be included to indicate that "the employer may in the course of any proceedings, refer to this agreement and to the performance thereunder to the extent that it is relevant to such proceedings." While it is clear that the state agency or our local agency may not enter into an agreement which waives the federal rights of parties, inclusion of a specific disclaimer of this intent is generally wise. In certain cases, it may be possible for the federal government to become a party to an agency proceeding as with the Memorandum of understanding that presently exist with the Newark Human Rights Commission and the New Jersey Division on Civil Rights.



### Poor Language

"Respondent will operate all employment procedures in conformance with the Pennsylvania Human Relations Act."

"Respondent will affirmatively recruit minority groups and women for all positions."

"Respondent will give favorable consideration to all minority and female applicants for all positions."

"Respondent will undertake to validate all tests and educational requirements for positions."

"Respondent will ensure equal opportunity for all women in company benefit programs."

Failure to deal with back pay liability

"Respondent will report regularly to the Commission on the progress under this agreement."

### Preferred Language

"The respondent agrees to undertake the following specific steps of affirmative action to ensure compliance with the Pennsylvania Human Relations Act."

Provide a detailed list of minority groups and women recruitment sources and establish a procedure of notification to such organizations.

Require the establishment of an affirmative action file of minority/women candidates which the employer is required to check first before considering other applications.

Require the elimination or the suspension of the use of test scores and educational requirements until the validation is completed and submitted to the Commission for approval and approval is obtained. Alternatively, where testing is continued provide affirmative remedial ratio hiring.

Identify which specific benefits have been denied to women and itemize the specific practices which are to change.

Ensure that all victims have been compensated (with specific amounts) for all periods where back pay liability exists. Include interest at 6% per year; do not deduct unemployment compensation payments; and provide for punitive damages in appropriate cases, see Gilliam v. City of Omaha, 4 EPD 7638

Alternative: provide that back pay will be awarded but deal with the issue separately.

Establish a detailed reporting system with the inclusion of appropriate forms for respondent's use.